

No. 46116-1-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

Big Blue Capital Partners of Washington, LLC,
Appellant

v.

Regional Trustee Services Corporation; Specialized Loan Servicing, LLC; and U.S. Bank
National Association, as Trustee for Terwin Mortgage Trust, 2005-4HE, Asset Backed-
Certificates, Series 2005-4HE, Respondents.

Appellant's Opening Brief

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I. INTRODUCTION

This is a case wherein the Appellant/Plaintiff, Big Blue Capital Partners of Washington, LLC's, ("Big Blue WA") claims against Respondent/Defendant Regional Trustee Services Corporation ("RTSC") for Violations of Washington Deed of Trust Act RCW 61.24 et. seq. ("DOTA"); Washington Consumer Protection Act RCW 19.86 et. seq. ("CPA"), and Declaratory Judgment pursuant to RCW 7.24 et. seq.; Injunctive Relief; and Damages were dismissed by the Honorable Christine Schaller, Judge of the Thurston County Superior Court on the summary judgment motion brought by Intervener-Defendant/Respondent Select Loan Servicing, LLC ("SLS") and Intervener-Defendant/Respondent U.S. Bank National Association, as Trustee for Terwin Mortgage Trust, 2005-4HE, Asset Backed Certificates, Series 2005-4HE ("US Bank"). Big Blue WA subsequent to the granting of SLS/US Bank's motion for summary judgment timely brought its motion to reconsider pursuant to CR 59 which the trial court denied. Big Blue WA seeks review of the lower court's decisions because:

1. The trial court erred in failing to adjudicate Big Blue WA's claims for Declaratory Judgment and Damages.
2. The trial court's erred in the granting of SLS's Motion for Summary Judgment and dismissal of ALL of Big Blue WA's claims

including its claim for declaratory judgment and claim for monetary damages based upon the Washington Supreme Court's Opinion in Frizzell v. Murray, 313 P.3d 1171, 179 Wn.2d 301 (2013) that clearly states at 310:

The language of the statute provides that failure to bring a lawsuit to restrain a sale may result in a waiver of grounds that may be raised for invalidating the sale, not for other distinct damages claims. As this court recently said, " '[W]aiver only applies to actions to vacate the sale and not to damages actions.'" Schroeder, 177 Wn.2d at 114 (quoting Klem v. Washington Mut. Bank, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013)).

As shown above, the trial court's interpretation of the Frizzell decision "...*there is no longer any relief that [Big Blue WA] can obtain as relates to post-sale contest...*" (VRP Pg. 32 Ln 13-15) is incorrect. If applicable at all the Frizzell decision limits only the relief to overturn or set-aside the wrongful foreclosure, because Big Blue WA was unable to satisfy the trial court's condition of posting a \$200,000 bond over the Thanksgiving holiday weekend, however the Frizzell decision in no way limits Big Blue WA's claims for declaratory judgment or relief for the monetary damages Big Blue WA has incurred as a result of RTSC, SLS, and US Bank completing the trustee sale and depriving Big Blue WA of its real property interests. (CP 28 - ¶ 2.9.3.8; CP 238 ¶2 – Dec. of Josh Auxier authenticating, Ex. H to Complaint - CP 98-107; CP 601-604 FAC ¶3.4)

3. The trial court erred in relying upon the conflicting declarations of Cynthia Wallace (CP 311-349) and Hunter Robinson (CP 464-502), employees of SLS, who were making statements related to information, the roles of 3rd parties, and events that had no documented or evidentiary support and that were purported to occur before SLS was ever involved in the matters at issue in this lawsuit.

4. The trial court failed to acknowledge the genuine material facts that were in dispute (VRP Pg. 32 Ln 16-17, VRP Pg. 33 4-7; VRP Pg. 34 Ln 15-19,) and further failed to construe the facts and reasonable inferences from the evidence in favor of the non-moving party i.e., Big Blue WA,(CP 529 - Resp. MSJ Pg. 16 Ln 10-22) among the inferences that should have been drawn include:

- a. That the Note and Deed of Trust were unenforceable because the named “Lender”, on both the Note and Deed of Trust “Apreva, Inc., a Washington Corporation” was NOT, in fact, a Washington Corporation at the time the Note and Deed of Trust were created and therefore Apreva, Inc., a Washington Corporation lacked the capacity to contract. (CP 518-519 Resp. MSJ Pg. 5-6 ¶1.3.6, CP 527-528 Resp. MSJ Pg. 14-15 §V(B)-(C), VRP Pg. 5 Ln 2 – Pg. 7 Ln 20) Instead, the trial court accepted of the last minute argument of the Intervener-

Defendant's Counsel that this was nothing more than a "scrivener's error" was inappropriate (VRP Pg. 33 Ln 18-25) and did not affect the enforceability of the Note or Deed of Trust (VRP 34 Ln 7-10), especially after Big Blue WA filed admissible evidence in support of its Motion for Reconsideration that this was not a scrivener's error, but was instead a rampant pattern of practice. (See CP 767 – Mtn for Reconsideration Pg. 9 Ln 14-19, CP 715-716 Dec of DB, Ex. A CP 717-757)

- b. That US Bank was not the Holder/Owner of Note with authority to foreclosure, because (i) the Note and Deed of Trust were not enforceable contracts (CP 527-528 Resp MSJ Pg. 14 §V(B)); (ii) the two contradictory versions of the Note created a disputed material fact as to the authenticity of the alleged (by SLS's employees) endorsement in blank (CP 516 - Resp to MSJ ¶1.3.2; CP 518 Ln 1-6); (iii) SLS's employee's declarations contradicted each other creating a material fact in dispute as to who held the Note (US Bank; or SLS; or Deutsche, *infra*). See CP 521-523 Resp. to MSJ ¶ 2.4-2.7
- c. That US Bank was not the Holder/Owner of the Note with the authority to foreclosure because the moving party failed to

satisfy its burden to support the claim that, a non-party, Deutsche Bank National Trust Company (“Deutsche”): (i) is the “*a document custodian and agent of US Bank*”; (ii) that Deutsche actually possessed the Note. (MSJ Resp. CP 517 ¶1.3.3; CP 521-523 ¶ 2.4-2.7)

- d. That the directly contradictory declarations of RTSC and the multiple tenant/occupants related to the posting of the Notices of Default in compliance with RCW 61.24.030(8) created a material issue of fact in dispute.

5. The trial court failed to consider that because RTSC never answered Big Blue WA’s Complaint each allegation contained therein was undisputed, by RTSC, at the time of the Summary Judgment hearing including those related to Big Blue WA’s injuries and damages. (CP 519 Ln 21- CP 520 Ln 4, CP 536 Ln 18- CP 537)

6. The trial court failed to take into consideration Big Blue WA’s First Amended Complaint and the allegations and relief requested contained therein which Big Blue WA had a right to amend its Complaint because RTSC had not filed any responsive pleading. See CR 15(a)“*...as a matter of course at any time before a responsive pleading is served...*”

As a result of the foregoing Big Blue WA respectfully requests that the trial court's orders be reversed and the case be remanded to the trial court in order for all Big Blue WA's claims under its First Amended Complaint to be fully adjudicated.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in the entry of its order, dated February 21, 2014, (CP 701-703) granting Summary Judgment to Intervener-Defendant SLS, and Intervener-Defendant US Bank and Dismissing Big Blue WA's lawsuit with prejudice including all of Big Blue WA's claims. The errors in the order were:

- a. The trial court's reliance upon the conflicting declarations of Cynthia Wallace and Hunter Robinson and where many of the statements contained therein were hearsay and were not adequately supported to be covered under the business records exemption.
- b. Dismissing the lawsuit with prejudice when: (1) Defendant RTSC had not answered or otherwise responded to the Complaint at the time of the dismissal; (2) Big Blue WA's claims for Declaratory Judgment and Damages had not been adjudicated.
- c. The standard for Summary Judgment had not been met

because: (1) materials issues of fact continued to be in dispute, (2) Defendant RTSC, nor Interveners SLS or US Bank were not entitled to judgment as a matter of law, and (3) the court failed to apply the standard of review under Civil Rule CR 56 that all inferences based on the evidence are to be made in favor of the non-moving party, who is Big Blue WA in this case.

- d. The trial court erred in its interpretation of Frizzell v. Murray, 313 P.3d 1171, 179 Wn.2d 301 (2013) stating that after the trustee sale occurred Big Blue WA could not obtain relief in the form of monetary damages.
- e. The trial court failed to consider the effect of Big Blue WA's First Amended Complaint.

2. The trial court erred in the entry of its Order Denying Big Blue WA's Motion for Reconsideration, dated March 19, 2014 (CP 873) with respect to the entry of the order dated February 21, 2014 granting Intervener-Defendant SLS, and Intervener-Defendant US Bank's Motion for Summary Judgment identified in Assignment of Error No. 1 above for the reasons that the court's February 21, 2014 order should have been reversed under: Civil Rule CR 59 because: (1) there existed pleadings and evidence clearly showing misconduct on the part of RTSC; (2) Big Blue

WA provided additional evidence to oppose the newly argued allegation that the identification of a non-existent entity (Apreva, Inc., a Washington Corporation) was a “scrivener’s error”, and was instead a pattern of rampant misrepresentation; (3) there was no evidence or reasonable inference from the evidence to justify the decision and the trial court’s ruling was contrary to the intent of Washington statutes and the holdings of Washington case law both of which Big Blue WA objected to at the time of the trial court’s ruling; and (4) the trial court’s order did not do substantial justice by allowing Big Blue WA’s real property interests to be wrongfully sold under the guise of a statutory non-judicial foreclosure.

III. Issues Pertaining to the Assignments of Error

- 1.** Did the trial court error in its reliance upon Frizzell v. Murray, 313 P.3d 1171, 179 Wn.2d 301 (2013) when it dismissed Big Blue WA’s entire lawsuit including the claims for Declaratory Judgment and post-sale monetary damages?
- 2.** Did the trail court error in relying upon the conflicting hearsay statements in the declarations of Cynthia Wallace and Hunter Robinson?
- 3.** Did the trial court error in granting Intervener-Defendant SLS, and Intervener-Defendant US Bank’s Motion for Summary Judgment where multiple material facts remained in dispute and the trial court failed to construe the inferences from the evidence in the non-moving parties, Big

Blue WA, favor?

4. Did the trial court error in granting Intervener-Defendant SLS, and Intervener-Defendant US Bank's Motion for Summary Judgment and dismissing Big Blue WA's lawsuit with prejudice where Defendant /Respondent RTSC had not answered or filed any responsive pleading to Big Blue WA's Complaint?

5. Did the trial court error in granting Intervener-Defendant SLS, and Intervener-Defendant US Bank's Motion for Summary Judgment where the Motion for Summary Judgment was seeking relief upon the original complaint where Big Blue WA had filed its First Amended Complaint which was appropriate under CR 15 as RTSC had not filed any responsive pleading?

IV. STATEMENT OF THE CASE

Plaintiff/Appellant, Big Blue Capital Partners of Washington, LLC (Big Blue WA) filed its summons and complaint against Defendant/ Respondent Regional Trustee Services Corporation on November 1, 2013, seeking Violations of the Washington Deed of Trust Act RCW 61.24. et. seq.; Violations of the Washington Consumer Protection Act RCW 19.86 et. Seq.; Declaratory Judgment pursuant to RCW 7.24 et. seq. and Injunctive Relief and Damages. (CP 7-54). The Complaint was supported by 15 Exhibits marked A-L, N-O (CP 50-218), the publically recorded

documents marked Exhibits A-F are judicially noticeable documents that are publically recorded in the Thurston County Auditor's Records. Among Big Blue WA's requested relief was determination by the trial court as to the rights and interests of RTSC performing actions of trustee relying upon an appointment of successor trustee that appeared to be void and of no effect as it was executed without authority. (CP 8 ¶1-3; CP 53 ¶ 5).

On November 14, 2013 Big Blue WA filed a Motion for Preliminary Injunction seeking to enjoin RTSC from taking further actions as trustee of the Deed of Trust (CP 260-278). This Motion was granted by the trial court however required payment of a \$200,000 bond within 4 days over the Thanksgiving holiday weekend. Big Blue WA was unable to satisfy the condition of the bond as a result the injunction dissolved.

On November 14, 2013 Big Blue WA Motion for Injunction also filed in support of its Motion for Injunction the Declaration of Josh Auxier, Manager of Big Blue WA (CP 237-240) ("Dec of JA in Sppt of Mtn for Inj"). The judicially noticeable publicly recorded document attached to the Complaint as exhibits A-G were authenticated as true and correct in ¶ 3. (CP 238). In ¶ 7 (CP 239), Exhibit G (a copy of the Note filed by SLS, in Dawne Delay's Bankruptcy US District of OR Bankruptcy Case # 12-35073-el7 in support of SLS's Motion for Relief from Stay) attached to the Complaint (CP 93-97) was authenticated and

reattached as Exhibit 4 (CP 254-258) this is also a judicially noticeable document that had been certified as a true and correct copy filed in the above referenced bankruptcy case. In ¶5 Exhibit H (a copy of the 10-17-13 Notice of Disclosure Big Blue WA sent to RTSC identifying the many issues that are subject of this lawsuit) attached to the Complaint (CP 98-107) was authenticated as a true and correct copy.

Also on November 14, 2013, Intervener-Defendants/Respondents SLS and US Bank filed a Motion to Intervene (CP 231-235).

On November 19, 2013, Defendant RTSC filed a Response to Plaintiff's Motion for Preliminary Injunction ("Resp to Mtn for Inj"). (CP 350-355). Defendant RTSC declined to respond to Plaintiff's allegations in its response (CP 351 Ln 15-24) with the exception of recognizing Big Blue WA's allegation that "...*Apreva, Inc. does not exist and MERS cannot be a beneficiary under Washington Law...*" (CP 353 16-18). There is no mention of the 10-17-13 Notice of Disclosure or any investigation into the legitimacy of the "Declaration of Ownership" (CP 362) it relied upon that was not from the purported beneficiary US Bank, but was instead from SLS. RTSC made no attempts in this Resp to Mtn for Inj or at any other place in the lawsuit to challenge the undeniable fact that Apreva, Inc. was not and is not a Washington Corporation.

On November 19, 2013, prior to being joined as Intervener's in this

action SLS and US Bank filed their filed an Opposition to Big Blue WA's Motion for Preliminary Injunction ("SLS Opp to Mtn for Prelim Inj"). (CP 280-292). Among other purported defenses, this response attempted to respond to Big Blue WA's allegations that the Deed of Trust and Note, named not only an unlawful party as Beneficiary, Mortgage Electronic Registration Systems, Inc., but also a non-exist Lender Apreva, Inc., a Washington Corporation. This argument appears in ¶ 2 The Deed of Trust is Valid and Enforceable (CP 287). SLS included as support for its argument that Apreva, Inc. a Washington Corporation existed a printout from the Washington Secretary of State corporations database for a company name "Apreva Financial Corporation" (CP 308-309). This is a completely different entity than the entity appearing on the Note and Deed of Trust as Lender. This was clearly addressed Big Blue WA Reply to Opp to Mtn for Inj ¶ 2.5 (CP 408).

On November 21, 2013, Big Blue WA filed its Reply to SLS and US Bank Opposition to Big Blue WA's Motion for Preliminary Injunction ("Reply to Opp to Mtn for Inj"). (CP 405-412) Big Blue WA's reply addressed the issues raised related to Big Blue WA's relationship to another OR entity bearing a similar name as well as Big Blue WA's standing to bring its claims (CP 406 ¶2.1 – CP 408 ¶2.3; CP 410 ¶ 2.8- CP 412 ¶2.11); The Reply to Opp to Mtn for Inj ¶ 2.4 (CP 408) also addressed

SLS's claim that US Bank was the "holder" of the Note and the issues that cause the Declaration of Cynthia Wallace (311-313). The Reply to Opp to Mtn for Inj was supported by the Declaration of Josh Auxier and the authenticated Exhibits 1 and 2 attached thereto. (CP 413-433).

On November 21, 2013 Big Blue WA also filed a Reply to RTSC's Resp to Mtn for Inj. (CP 434-441). Big Blue WA identified that RTSC had not opposed the motion; addressed RTSC's violation of its duty of good faith and further and addressed the material fact in dispute that RTSC failed to adhere to the requirements of the DOTA by not deliver or posting the Notice of Default and Notice of Trustee Sale on The Property. (CP 436 ¶ 2.2 – CP 438 ¶ 2.7).

On November 22, 2013 the trial court issued two orders: (1) Granting SLS and US Bank Motion to Intervene (CP 442-444); and (2) Granting Big Blue WA's Motion for Preliminary Injunction on the condition that Big Blue WA shall post a bond in the amount of \$200,000 by December 2, 2013 or the order shall dissolve (CP 445-447).

On November 22, 2013, immediately after the trial court enjoined RTSC from acting as trustee. RTSC reset the trustee sale for December 27, 2013. (CP 586-7 ¶2.17.3-5)

On December 2, 2013 because Big Blue WA in part due to large nature of the bond and in part due the short timeframe provided to comply

with taking into consideration that there were only 2 business days due to the Thanksgiving holiday was unable to comply with the bond requirement and the injunction dissolved.

On December 27, 2013 RTSC completed the trustee sale of The Property, as such there is absolutely no questions as to the injury and damages caused to Big Blue WA by the co-operative actions of RTSC, SLS, and US Bank. That injury and damages is at a minimum the value of The Property that Big Blue WA has now been deprived of. (CP 587-590, ¶2.18)

On January 24, 2014 Intervener-Defendant's SLS and US Bank filed their Motion for Summary Judgment (CP 448-462) that essentially brought three arguments: (1) that the Deed of Trust is Valid and Enforceable (CP 453-4 §B(1)); (2) US Bank is the Beneficiary and the validity of the Assignment of Deed of Trust is irrelevant (CP 454-7 §B(2)); (3) RTSC was properly appointed as successor trustee of the Deed of Trust; The arguments in this Motion for Summary Judgment were all but identical to SLS and US Bank's earlier SLS Opp to Mtn for Prelim Inj (CP 287-291 §B) that had been ruled against by the trial court on November 22, 2014.

The SLS/ US Bank Summary Judgment Motion was supported by the declaration of an SLS employee, Hunter Robinson. (CP 464-466). At no

point during the lawsuit has any US Bank, employee or representation made any arguments, statements, or provided any evidence.

On February 10, 2014, Big Blue WA filed its Response in Opposition to the SLS/ US Bank Summary Judgment Motion (“Resp to SLS/US Bank MSJ”). (CP 514-538). Big Blue WA Response was supported by the many authenticated and judicially noticeable documents already a part of the record, such as those attached to the Complaint and authenticated by the Dec of JA in Sppt of Mtn for Inj (CP 237-240).

On February 18, 2014 SLS/ US Bank filed their Reply in Support of Motion for Summary Judgment. (CP 539-548).

On February 19, 2014 Big Blue WA whereas neither the Defendant RTSC nor either of the Intervener-Defendants SLS or US Bank had filed any responsive pleadings, as a matter of course, pursuant to CR 15 filed its First Amended Complaint which incorporated each of the previously authenticated and judicially noticeable exhibits attached to Big Blue WA’s original Complaint as well as an additional Exhibit P. (CP 550-615).

Also on February 19, 2014 RTSC filed an additional Reply to Big Blue WA’s Resp to SLS/US Bank MSJ (CP 616-620). This was supported by the declarations of Joe Solseng (CP 621-628) and Deborah Kaufman (CP 629-700).

On February 22, 2014 the trial court, after hearing oral arguments

and acknowledging the undeniable issues associated with the existence of Apreva, Inc., a Washington Corporation, (CP 518-519 Resp. MSJ Pg. 5-6 ¶1.3.6, CP 527-528 Resp. MSJ Pg. 14-15 §V(B)-(C), VRP Pg. 5 Ln 2 – Pg. 7 Ln 20) nevertheless was Granted SLS/ US Bank’s Motion for Summary Judgment.

On March 2, 2014 Big Blue WA’s filed its Motion for Reconsideration (CP 759-770). This motion was further supported by the Declarations of Edward Mueller (CP 704-713) and Donna Gibson (CP 715-757).

On March 12, 2014 SLS/ US Bank’s filed their Opposition to Big Blue WA’s Motion for Reconsideration. (CP 772-779) along with the Declaration of Andrew Yates (CP 781-856).

Also on March 12, 2014 RTSC filed its Response to Big Blue WA’s Motion for Reconsideration. (CP 857-862).

On March 13, 2014, Big Blue WA filed its Reply to SLS/ US Bank’s filed their Opposition to Big Blue WA’s Motion for Reconsideration. (CP 864-871)

On March 19, 2014, the trial court issued its Order denying Big Blue WA’s Motion for Reconsideration. (CP 873)

On April 9, 2014 Big Blue WA’s filed its Notice of Appeal.

V. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is only proper when viewing the facts in the light most favorable to the non-moving party, there are NO genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. CR 56(c), Ranger Ins. Co v. Pierce County, 164 Wn2d 545,522, 192 P.3d 886 (2008). The moving party is not entitled to judgment as a matter of law if a reasonable person could differ on a conclusion. Scott v. Pac. W. Mtn. Resort, 119 Wn. 2d 484, 502, 834 P.2d (1992). Affidavits submitted in support of, or in response to a motion for summary judgment must set forth such facts as would be admissible in evidence, must be made on personal knowledge, and must affirmatively show that the affiant is competent to testify as to his or her averments. CR 56(e); Grimwood v. University of Puget Sound, Inc., 110 Wash.2d 355, 753 P.2d 517 (1988) In a summary judgment motion, the moving party initially bears the burden of submitting adequate affidavits showing that it is entitled to judgment as a matter of law. Michael v. Mosquera-Lacy, 165 v. Wn.2d 595, 601, 200 P.3d 695 (2009). If the moving party does not sustain its burden, the superior court should deny summary judgment “regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion.” Hash v. Children’s Orthopedic Hosp. & Med. Ctr., 110 Wn 2d 912, 915, 757, P. 2cd 507 (1988) If the nonmoving party demonstrates that an issue of material fact

exists which establishes a genuine issue for trial, then summary judgment must be denied. See CR56(e) and, e.g. Young v. Key Pharm, Inc. 112 Wn.2d 216, 770 P.2d.(1989). All facts and reasonable inferences from the evidence must be construed in favor of the nonmoving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

VI. ARGUMENT

A. **The Trial Court Erred In Granting Summary Judgment and Dismissing the Lawsuit Where the Evidence Clearly Showed Apreva, Inc., a Washington Corporation, Did Not Exist and Therefore Lacked the Capacity to Contract – At A Minimum This Is A Genuine Material Fact That Is In Dispute.**

The properly trial court acknowledged this issue at the opening of oral arguments. See VRP Pg. 5 Ln 11 – Pg. 7 Ln 20:

So on the issue of when the Promissory Note was endorsed in blank, **I have copies of two promissory notes...that is very relevant from my perspective. Why does that not raise a genuine issue of material act? ...**

One of the issues is whether or not Apreva, Incorporated, was really a company that could have entered into the contract in the first place....When I look at the documents, one of the things you indicated was, well, plaintiff mistakenly believed that Apreva was a Washington corporation and it was a Utah corporation. Well, the reason that the plaintiffs think it is a Washington corporation is because all of the documents say it is a Washington corporation. It lists the Promissory Note, the Deed of Trust. The say Apreva, Incorporated, a Washington corporation. It says that on the first page of the Note, It says it on the first page of the Deed of Trust....**When I look at the document that you submitted saying it's a Utah corporation, they were inactive as a Utah corporation as of – I believe it's September 15, 2005. So it is relevant as to when the note was endorsed in blank... I need you to**

tell me why these aren't genuine issues of material fact.
(emphasis added).

The first issue raised by the trial was never resolved during oral arguments and there is nothing in the record that identifies when the promissory note was allegedly “endorsed in blank”. What the record does show is that the copy that SLS submitted in support of its motion for relief from stay in Oregon Bankruptcy Case # 12-35073-elp7, on November 29, 2012 was NOT endorsed in blank. (CP 96). Further, all of the documents related to Apreva, Inc. undeniably show that it is and was NOT a Washington Corporation at all times relevant. (CP 237-9, Ex. 1). Although SLS first argued that Apreva, Inc. was a Washington Corporation (CP 287 Ln 10-11) and SLS’s counsel Andrew Yates, supported this with a printout from the Washington Secretary of State for Apreva Financial Corporation (CP 295). A simple review clearly shows that the entity found by Mr. Yates, is different than the entity named on the Note and Deed of Trust and the purported endorser of the Note is not a listed executive officer. (CP 308-310). There was no evidence or support provided by RTSC, SLS, or US Bank in their summary judgment motion (See Big Blue WA’s Resp - CP 518-519 ¶1.3.6; CP 521 ¶2.4; CP 523 ¶2.6; CP 529 Ln 12-22; CP 532 Ln 3-9) to further address this issue that is fatal to all of their other arguments. When this was clearly identified by Big Blue WA in its response to the Motion for Summary Judgment (CP 408 ¶2.5). SLS story

changed stating that the company was not, in fact, a Washington corporation as identified on the Note and Deed of Trust, but was instead a Utah Corporation the Apreva Financial Corporation (CP 545, Ln 4-8) and incorrectly identifies the records that were intended to support those statements.

The trial court further identified at oral arguments that these arguments were flawed. See VRP Pg. 7:

The document from Utah says that they do business as Apreva Funding, and that's not reflected on this document. It doesn't say that they are a Utah corporation on this document.

And what was registered in Washington was something called Apreva Financial Corporation. When I look at those documents, the name of the officers listed did not match the name of the person who endorsed, in blank, the Promissory Note.

And so my question is, how those issues and discrepancies, if I take the evidence in the light most favorable to the nonmoving party, do not create a genuine issue of material fact about the initial Promissory Note and Deed of Trust...

SLS and US Bank's response was that the identification of Apreva, Inc. as a Washington entity was a "scrivener's error" and the facts here are similar to the unlawful identification of MERS, which also appeared on the Deed of Trust, relying on the Washington Supreme Court's decision in Bain v. Metropolitan Mortg. Group, Inc., 285 P.3d 34, 175 Wn.2d 83, 89, 95-97, 110-112 (2012) that simply the naming of MERS did not invalidate

a Deed of Trust. This logic is flawed. With the facts of that case while discussing an argument by the co-plaintiff Selkowitz that rescission and quiet title would be proper the Bain Court concluded:

[Selkowitz] offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title. He refers to cases where the lack of a grantee has been held to void a deed, but we do not find those cases helpful. In one of those cases, the New York court noted, “No mortgagee or obligee was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper.” Chauncey v. Arnold, 24 N.Y. 330, 335 (1862). But the deeds of trust before us names all necessary parties and more.

Here ALL of the necessary parties are not listed. The named Lender on both the Note and Deed of Trust does not exist and did not exist at the time of the origination. Big Blue WA, proved this with admissible evidence. Whereas, MERS could possibly under certain circumstances be acting upon a valid principal in the Bain and Selkowitz cases here, that is an impossibility, because the principle that each of the documents relevant to this case identify MERS’s principal as “Apreva, Inc, A Washington Corporation” and that party **DOES NOT** and **DID NOT** exist.

The argument of a scrivener’s error was clearly dispelled by Big Blue WA in its Motion for Reconsideration. (CP 761 Ln 10-17; 767-768 §A; 715-16, Ex A 717-758) with the identification of over 100 identical

naming of Apreva, Inc., a Washington Corporation.

To be entitled to summary judgment RTSC, SLS, and US Bank were required to demonstrate that the Deed of Trust was a valid and enforceable contract that satisfied the statute of frauds in order for a security interest in Big Blue WA's real property to exist. RTSC, SLS, and US Bank failed to meet that burden, as such "the superior court should deny summary judgment", *Hash*, supra.

Even if there was a Utah corporation in existence it doesn't remedy the fact for a security interest in real property to be valid it must satisfy the statute of frauds by being a valid and enforceable contract and an entity that does not exist lacks the capacity to contract. See White v. Dvorak, 78 Wash. App. 105, 110, 896 P.2d 85,88 (1995):

"First, a contract made in the name of a dissolved corporation may sometimes be enforced by another person associated with the corporation who is a real party in interest. Id., cf. RCW 23B.14.050(2)(e). Second, when a person assumes to act as a corporation, the person is personally liable to the other party on the contract. Former RCW 23A.44.100(1) (now RCW 23B.02.040). In other words, the person who is assuming to act as a corporation can be sued by the other party. If the contract were void, no such suit would be possible. Therefore, although the corporation cannot enforce a contract entered into when it lacked the capacity to contract, the contract is not absolutely void or completely unenforceable. Alexson v. Steward, 55 Cal.App. 251, 203 P. 423, 425 (1921).^{FN2}"

Under this analysis, which dealt with a dissolved corporation as

opposed to a company that never existed. First, in order for Apreva Inc., a Washington Corporation, to be a person that “...*may sometimes be enforced by another person associated with the corporation...*” Apreva Inc., a Washington Corporation, must prove that it was a “real party in interest” with standing adequate to litigate. This requires, first identification of the real party of interest at the time of the origination of the Note and Deed of Trust and then a further analysis of that person’s constitutional and prudential standing as discussed by the Bankruptcy Appellate Panel in *In Re: Veal*, 450 B.R. 897 (B.A.P 9th Cir. 2011) at 906:

“Constitutional standing requires an injury in fact, which is caused by or fairly traceable to some conduct or some statutory prohibition, and which the requested relief will likely redress. *Winn*, 131 S.Ct. at 1442; *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); *United Food & Comm'l Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996).”

and further *Veal* stated at 907

“...prudential standing principles which generally provide that a party without the legal right, under applicable substantive law, to enforce an obligation or seek a remedy with respect to it is not a real party in interest. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044 (9th Cir.2008).”

Second, as shown by a complete reading of the *White* opinion the only party who may enforce the contract would be Big Blue WA, “*when a person assumes to act as a corporation, the person is personally liable to the other party on the contract.... In other words, the person who is assuming to act as a corporation can be sued by the other*

party...Therefore, although the corporation cannot enforce a contract entered into when it lacked the capacity to contract, the contract is not absolutely void or completely unenforceable.” (emphasis added)

Further, whereas validity cannot be given to that which is invalid by transfer, conveyance, endorsement, or estoppel. “*Validity cannot be given to an illegal contract through any principle of estoppel.*” Vedder v. Spellman, 78 Wn.2d 834,837, 480 P.2d 207 (1971). The unenforceable contract is not made enforceable by any of the purported endorsements, assignments, or transfers that RTSC, SLS, and US Bank rely upon.

At a minimum, the above created a material fact in dispute that precludes the granting of summary judgment.

B. The Trial Court Erred In Considering The Contradictory and Hearsay Statements Contained Declarations of Cynthia Wallace and Hunter Robinson.

The trial court manifestly abused its discretion when it considered the declarations of Cynthia Wallace (CP 311-349) and Hunter Robinson (CP 464-502) as admissible support for the contention that US Bank, actually held the Note. Big Blue WA described in detail the multiple issues with the conflicting declarations of Cynthia Wallace (CP 408 ¶2.4-2.5) and Hunter Robinson (CP 528 ¶ Ln 8-19). As well as the various conflicts between these declarations (CP 516 ¶1.3.2 – CP 518 ¶1.3.4; CP 521 ¶2.4 – CP 523 ¶ 2.6).

These declarations do not qualify under the business rule exemption

to hearsay in relation to the statements about 3rd parties, US Bank, and Deutsche Bank National Trust Company, nothing in SLS's business records nor Ms. Wallace's or Mr. Robinson's review of those records could satisfy the elements of that exemption: (1) the record's identity; (2) its mode of preparation, (3) if it was made in the regular course of business, and (4) if it was made at or near the time of the act, condition, or event. Discover Bank v. Bridges, 154 Wn. App. 722, 726, 226 P. 3d 191 (2010). SLS's business records did not begin to exist until SLS started servicing the account in March 1, 2005, as such no records of SLS could have been created at or around the time that US Bank is supposed to have come into possession of the Note, on January 19, 2005. (CP 465 ¶ 3 & 4). This claim by an SLS employee, of a 3rd party, Deutsche Bank National Trust Company, having possession of the Note is in and of itself hearsay. SLS has no knowledge of what Deutsche Bank does or does not possess, nor do these conflicting declarations purport to provide any support for this notion.

These declarations also provide no record or support of any kind for the claim that Deutsche Bank is "the custodial trustee of Terwin Mortgage Trust 2005-4HE, Asset-Backed Certificates, Series 2005-4HE, nor do Mr. Robinson or Ms. Wallace, claim to have personal knowledge of these facts.

At a minimum, the hearsay identified above in addition to the fact Big Blue WA provided admissible evidence, two copies of different versions of the note, (CP 238, Ex 2 (CP246-249); 239, Ex 4 (CP 254-258)) creates a disputed question of material fact that precludes summary judgment.

C. The Trial Court Erred In Dismissing The Entire Action Without Adjudicating Each Of Big Blue's Claims For Declaratory Judgment And Monetary Damages Relying Upon The Washington Supreme Court Ruling In Frizzell V. Murray 313 P.3d 1171, 179 Wn.2d 301 (2013).

The trial court's erred in the granting of SLS's Motion for Summary Judgment and dismissal of ALL of Big Blue WA's claims including its claim for declaratory judgment and claim for monetary damages based upon the Washington Supreme Court's Opinion in Frizzell v. Murray, 313 P.3d 1171, 179 Wn.2d 301 (2013) that clearly states at 310:

The language of the statute provides that failure to bring a lawsuit to restrain a sale may result in a waiver of grounds that may be raised for invalidating the sale, not for other distinct damages claims. As this court recently said, "[W]aiver only applies to actions to vacate the sale and not to damages actions." Schroeder, 177 Wn.2d at 114 (quoting Klem v. Washington Mut. Bank, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013)).

As shown above, the trial court's interpretation of the Frizzell decision "...there is no longer any relief that [Big Blue WA] can obtain as relates to post-sale contest..." (VRP Pg. 32 Ln 13-15) is incorrect. If applicable, the Frizzell decision may limit the relief to overturn or set-

aside the wrongful foreclosure, because Big Blue WA was unable to satisfy the trial court's condition of posting a \$200,000 bond over the Thanksgiving holiday weekend, however the Frizzell decision in no way limits Big Blue WA's claims for declaratory judgment or relief for the monetary damages Big Blue WA has incurred as a result of RTSC, SLS, and US Bank completing the trustee sale and depriving Big Blue WA of its real property interests. (CP 28 - Complaint ¶ 2.9.3.8; CP 238 ¶2; CP 98-107; CP 601-604 FAC ¶3.4)

This misinterpretation of the Frizzell case should be overturned as to Big Blue WA's ability to seek relief by way of monetary damages for the undeniable injury it has now suffered including the loss of rental monies on an adjacent property and the loss of title to The Property that is subject of this lawsuit, which counsel for RTSC, SLS, and US Bank were made aware of prior to their completion of the trustee sale based upon a Deed of Trust that was unenforceable.

D. Whereas No Responsive Pleadings to Big Blue WA's Original Complaint were filed; Big Blue WA is a protected party under DOTA and/or CPA; both of which and the Frizzell Court agree allow for monetary damages post-sale. Big Blue WA First Amended Complaint Should Have Been Considered by the Trial Court and Big Blue WA's claims for Declaratory Judgment and Monetary Damages Should Not Have Been Dismissed.

At no time did RTSC, SLS, and US Bank file answers or responsive pleading as defined in CR 7(a) to Big Blue WA's Complaint. As a result

the trial court's granting of summary judgment was pre-mature, and Big Blue WA had a right to amend its Complaint. See CR 15(a) "*...as a matter of course at any time before a responsive pleading is served...*". The trial court's failure to consider the amended claims contained therein was in error.

Among those claims for relief were relief for monetary damages under the various statutes that Big Blue WA is in the zone of interests of; CPA - RCW 19.86.010 and DOTA - RCW 61.24.005 as a "Person" under each statute.

CPA - RCW 19.86.010(1):

"Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

The trial court has also misinterpreted the DOTA stating that the DOTA's protections are limited to "borrowers" when in fact the DOTA provides a much wider description of its application both in the duty of good faith that is owed by trustees under RCW 61.24.010 "*The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.*" (emphasis added). The DOTA further defines the term "grantor" in the subsections of RCW 61.24.005:

(7) Grantor: means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

(11) Person: "means any natural person, or legal or governmental

entity” who have interests in a property subject to non-judicial foreclosure proceedings.

Whereas, Big Blue WA is undeniably the “successor” to Dawne Delay by its acquisition from the Bankruptcy Trustee this definition clearly includes Big Blue WA. The DOTA has in the recent few years been interpreted in a series of cases reaching up to the Supreme Court of Washington one of the most recent such cases is Lyons v. U.S. Bank NA, 336 P.3d 1142, 181 Wn.2d 775 (Wash. 2014), the Lyons Court, while decided after the trial court decisions subject to this appeal, summarizes the findings of several authority cases that Big Blue WA presented to the trial court. See Lyons at 787 §1:

1. There were material issues of fact regarding whether NWTS did not act in good faith

RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the [336 P.3d 1149] borrower, beneficiary, and grantor. “[U]nder our statutory system, a trustee is not merely an agent for the lender or the lender's successors. **Trustees have obligations to all of the parties to the deed, including the homeowner.**” Bain, 175 Wn.2d at 93. This duty requires the trustee to remain impartial and protect the interests of all the parties. “[T]he trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions.” Klem, 176 Wn.2d at 791. **A foreclosure trustee must “adequately inform” itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a “cursory investigation” to adhere to its duty of good faith.** Walker, 176 Wn.App. at 309-10. (emphasis added)

Each of the cases cited by the Lyons court were presented to the trial court as controlling authority (Bain, CP 523 ¶ 2.6, CP 535-46 §E;

Klem CP 524 ¶2.8, 480) The trial court's conclusion that Big Blue WA could not seek relief for the undeniable injury caused by RTSC, SLS, and US Bank under the CPA by way of monetary damages was based on untenable grounds and should be overturned. See Frias v. Asset Foreclosure Servs., Inc., 334 P.3d 529, 181 Wn.2d 412 (Wash. 2014) at 431:

Without question, where a plaintiff actually loses title to her house in a foreclosure sale or actually remits foreclosure fees, that plaintiff has suffered injury to his or her property. However, those injuries are not necessary to state a CPA claim--other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context.

The CPA's requirement that injury be to business or property excludes personal injury, "mental distress, embarrassment, and inconvenience." Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 57, 204 P.3d 885 (2009). The financial consequences of such personal injuries are also excluded. Ambach v. French, 167 Wn.2d 167, 178, 216 P.3d 405 (2009). **Otherwise, however, the business and property injuries compensable under the CPA are relatively expansive.**

Because the CPA addresses "injuries" rather than "damages," quantifiable monetary loss is not required. Panag, 166 Wn.2d at 58. A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. *Id.* at 55-56 & n.13. **Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. *Id.* at 62** ("Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not." (citations omitted)). The injury element can be met even where the injury

alleged is both minimal and temporary. Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990). (emphasis added)

E. **The Trial Court Erred When It Granted RTSC, SLS, and US Bank's Motion For Summary Judgment Where Genuine Material Facts That Were In Dispute Existed and The Trial Court Further Failed To Interpret The Inferences From The Evidence In Big Blue WA's Favor, As The Non-Moving Party,**

Big Blue WA briefed several of the genuine issues of material fact that existed in its Response to SLS, and US Bank's Motion for Summary Judgment (CP 514-519) and will only summarize those here, the material facts in dispute included, but are not limited to:

1. Whether the Note and Deed of Trust were enforceable (See Argument ¶ A, *supra*)
2. That RTSC violated the DOTA by not strictly complying with RCW 61.24.030(8) and RCW 61.24.040(1)(e) and therefore lost statutory authority to non-judicially foreclosure the Deed of Trust. (CP 515-516 ¶1.3.1; CP 413-433).
3. Whether SLS and/or US Bank were the Holder/Owner of the Note. (CP 516-7 ¶ 1.3.2)
4. Whether Deutsche is the custodial agent of US Bank and/or whether US Bank is actually the Trustee for the Terwin 2005-4HE Trust. (CP 517 ¶ 1.3.3; CP 521-523 ¶2.4 - 2.7)
5. Whether the Note was actually or validly indorsed in blank and on what date that occurred. (CP 237-240 referencing Ex. 2–CP

F. Attorney's Fees On Appeal.

Big Blue WA is entitled to an award of attorney's fees on appeal because Big Blue WA would have been entitled to an award in the trial court. West Coast Stationary Eng'rs Welfare Fund v. City of Kennewick, 29 Wn. App. 466, 477, 694, P. 2d 1101 (1985)

RAP 18.1(a) entitles a party to recover fees based on a statute. Here RCW 4.84.330 and the applicable attorney's fees provision in the Deed of Trust (CP 72 ¶26) and the CPA (See RCW 19.86.190) allows Big Blue WA to recover its fees on appeal.

VII. CONCLUSION.

Appellant, Big Blue WA has presented a clear summary of its case on this appeal in its Introduction as pp. 1-6 above. The Statement of the Case at pp. 9-17 above lays out Big Blue WA's efforts to tie all relevant events and evidence to the pertinent parts of the Clerk's Papers. The Standard of Review for Summary Judgment is addressed at pp. 17-18. The essential part of that Standard of Review is that Summary Judgment is not appropriate where materials facts in dispute exist and the Court is to draw all inferences from the evidence in favor of the nonmoving party, which is Appellant Big Blue Capital Partners of Washington, LLC and that SLS, and US Bank failed to adequately sustain its burden of

submitting adequate affidavits showing that it is entitled to judgment as a matter of law. The Argument, pp. 19-33 lays out Big Blue WA's arguments under 5 separate headings each of which addresses at least one issue in this appeal.

Big Blue WA believes the trial court erred repeatedly, as explained in the Argument by failing to follow the Standard of Review for Summary Judgment, accepting inadmissible evidence, and making findings that were based on untenable grounds.

For each and all of those reasons Appellant Big Blue WA asks that the trial court's Orders granting Summary Judgment to each Defendant, and the Order Denying Reconsideration discussed above be reversed and the matter remanded to the trial court with instructions for further proceedings consistent with this court's decision.

Respectfully submitted this 7th day of April, 2015.

A handwritten signature in black ink, appearing to read "Donna Gibson", written in a cursive style.

Donna Gibson, WSBA #33583
Attorney for Appellant Big Blue
Capital Partners of Washington, LLC

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7 **IN THE WASHINGTON STATE COURT OF APPEALS**
8 **DIVISION TWO**

9 **BIG BLUE CAPITAL PARTNERS OF**
10 **WASHINGTON, LLC**

11 **Plaintiff,**

12 **vs.**

13 **REGIONAL TRUSTEE SERVICES**
14 **CORPORATION**

15 **Defendants,**

16 **Specialized Loan Servicing, LLC and U.S.**
17 **Bank National Association, as Trustee for**
18 **Terwin Mortgage Trust, 2005-4HE, Asset**
19 **Backed Certificates, Series 2005-4HE,**

20 **Intervener-Defendants.**

Case No. 46116-1-II

CERTIFICATE OF SERVICE

21
22
I, Donna Gibson, certify that on the 7th day of April, 2015 I caused the Plaintiff's
Opening Brief to be served by legal messenger on the following parties:

1 Attorney for Defendant Regional Trustee
2 Services Corporation
3 Wesley Jude Werich
4 Robinson Tait, P.S.
5 710 Second Avenue, Suite 710
6 Seattle, WA 98104

Attorney for Intervener-Defendant(s)
Specialized Loan Servicing, LLC and U.S.
Bank National Association, as Trustee for
Terwin Mortgage Trust, 2005-4HE, Asset
Backed Certificates, Series 2005-4HE,
Lane Powell PC
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7 Attorney for Receiver for Defendant Regional
8 Trustee Services Corporation
9 Christine Marie Tobin-Presser
10 Bush Strout & Kornfeld, LLP
11 601 Union St STE 5000
12 Seattle, WA 98101-2373

13 AGAIN ON THE 6th day of February, 2017, I emailed all parties, asking if they wanted
14 another copy. I received no response.

15 On February 9, 2017, I again mailed a true and completed copy to all parties listed above.

16 I hereby declare that the above statement is true to the best of my knowledge and belief, and
17 that I understand it is made for use as evidence in court and is subject to penalty of perjury.

18 DATED this 9th day of February, 2017.

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Donna Gibson WSBA 33583
Attorney for Plaintiff/Appellant
Big Blue Capital Partners of Washington, LLC